INJING v. TUAH & ANOR.

[A.C.J. (Seah J., Ali Majang and Penghulu Pengabang, assessors) October 23, 1970]

[Sibu — Native Court of Appeal, Civil Appeal No. 1 of 1970]

Native Customary Law — Dayak customary law — Temuda land — Owner of land under customary rights emigrating elsewhere in Sarawak — Whether he loses rights in the land — Whether person subsequently using the land acquires right in it — Land Code, (Cap. 81), s. 5 — Native Customary Law Ordinance (Cap. 51).

Land Laws — Untitled land — Dayak customary law — Temuda land — Owner under customary rights emigrating to another district — Whether forfeits his rights and interest.

In this case one Tamboh had owned certain land under Dayak customary law in the Third Division, Sarawak but he had emigrated to the Fourth Division without assigning the land to anyone. The appellant claimed to be the cousin and adopted brother of Tamboh. The respondents had made use of the said land with the permission of the Penghulu. The Resident's Native Court had allowed an appeal by the respondents against the judgment of the District Native Court and had thereafter stated a case for the determination of the Native Court of Appeal. The case stated dealt with three short points of Dayak customary law as follows:—

(a) Is it right under Dayak customary law of the Third Division of Sarawak that once the owner of land under customary rights had emigrated elsewhere in Sarawak, he thereby forfeits all rights and interests in the land he leaves behind?

(b) If the answer to (a) is in the affirmative who is entitled to the rights and interest over such land?

(c) Whether having regard to the evidence, the decision of the Resident's Native Court is correct and can be supported in law?

Held: dismissing the appeal, (1) under Dayak customary law of the Third Division of Sarawak the owner of land under customary rights forfeits all rights and interest in the land if he has emigrated elsewhere in Sarawak;

(2) as the respondents had made use of the land with the permission of the Penghulu, who had control over the said land, they have acquired a right and interest in the land;

(3) the decision of the Resident's Native Court was therefore correct in law and could be supported by both the Native Customary Laws and the evidence produced before the courts.

[Editorial Note: Reference may be made to *Abang* v. *Saripah* [1970] 1 M.L.J. 164.]

Case referred to:-

(1) *Sumbang anak Sekam* v. *Engkarong anak Ajah* [1958] S.C.R. 95.

CIVIL APPEAL.

Daniel Tajem for the appellant.

Joseph Tang for the respondents.

Seah J.: This is an appeal by way of case stated from the decision of the Resident's Native Court, Third Division, Sarawak, dated the 22nd August, 1969 when they allowed an appeal by Tua Rumah Tuah anak Singalang and Ngindang anak Sengalang against the judgment of the District's Native Court holden at Sibu, Sarawak. This appeal raises three short points of Dayak customary law and they are:—

(a) Is it right under Dayak customary law of the Third Division (of Sarawak) that once the owner of land under customary rights had emigrated elsewhere in Sarawak, he thereby forfeits all rights and interest in the land he leaves behind?

(b) If the answer to (a) is in the affirmative who is entitled to the rights and interest over "such land"?

(c) Whether having regard to the evidence, the decision of the Resident's Native Court is correct and can be supported in law?

The history of the case may be briefly summarised as follows:—

(i) The disputed *temuda* land is situated at the 13th Mile Oya Road, Sibu, Sarawak and is held under Dayak customary law. It is therefore untitled land.

(ii) It has been admitted that the disputed *temuda* land originally belonged to one Dayak named Tamboh, who emigrated with his family to Bintulu in the Fourth Division, some fifty years ago and there was no evidence that he assigned the customary rights in the land to Injing anak Kunbang or his father in the form of gift.

(iii) It has not been disputed that before leaving the district, Tamboh had not handed over his customary farming rights in the land to another Iban of the same longhouse or residing under the same Penghulu's jurisdiction by means of *Tungkus asi* which must be performed publicly, preferably before a Tua Rumah and sealed with a customary *tanda* or token which may consist of a meal, pig or other chattel except money. It is to be noted that *Tungkus asi* confers on the person a limited right only, *viz.* the right to farm for one particular season. It does not entitle the person the right to farm for an indefinite period.

(iv) The Resident's Native Court rejected both the claims of Injing anak Kunbang that he is the cousin as well as the *menyadi ambu* or adopted brother of Tamboh on the ground that they had not been proved. Dealing with the Dayak custom of *menyadi ambu*, the Resident's Native Court held that a *menyadi ambu* would only get the chattel such as gong, jar used for that purpose and would not be entitled to claim for equal share of the adopting parents' property including land.

(v) The Resident's Native Court found as a fact that Tua Rumah Tuah anak Singalang and Ngindang anak Sengalang have had been making use of the disputed *temuda* land since Tamboh's departure from the district and ordered that it should be reverted to them despite the fact they had entered into a void and invalid agreement to purchase the disputed *temuda* land from Tamboh in or about 1964, for the sum of $150.00 (dollars one hundred and fifty only).

(vi) Against that finding, Injing anak Kunbang lodged his objection and acting under the provisions of section 8(1)(d) of the Native Courts Ordinance (Cap. 43) the Resident's Native Court stated a case containing the three abovementioned questions for the determination of the Native Court of Appeal.

Before dealing with the substantive questions, the court would like to refer to the provisions of section 5 of the Land Code (Cap. 81) and the relevant subsection (2) reads:

"(2) The methods by which native customary rights may be acquired are —

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that until a document of title has been issued in respect thereof such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the State and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him.

Provided further that the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the commencement thereof."

It is clear from the authorities that this disputed *temuda* land is governed by the Native Customary Laws, which are contained in Vol. 7 of the Laws of Sarawak, Appendix "A" on page 631. That the Dayaks in the Third Division of Sarawak are subjected to these native customary laws is implicit from the headnote which reads: —

'A guide to Judges, Magistrates and others on adoption, divorce, the acquisition and disposition of property as practised amongst Sea Dayaks of the Third Division, ratified at the Penghulus' Conference held at Sibu on 15th July, 1952."

Paragraph 7 provides *inter alia*, that —

"The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes *temuda*. It is a recognised custom that *temuda* is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance."

This is because theoretically all untitled land whether jungle or cleared for padi farming is the property of the State. It is understood that —

"No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land."

So —

"When a Dayak abandons his land *'temuda'* and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right."

This was made clear by the Rajah's order dated 10th August, 1899 Land Tenure Act, which states that:

"Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under grant."

In *Sumbang anak Sekam* v. *Engkarong anak Ajah*[1] Lascelles J. in delivering the judgment of the Native Court of Appeal said at page 97: —

"... if the holder of customary farming rights moves from a particular longhouse but remains within the same Penghulu's jurisdiction, he continues to retain in full such farming rights provided his move does not take him beyond what can only be described as 'reasonable farming distance' from the land. This of course would have to be a pure question of fact and naturally in modern times with outboard engines people are often enabled to farm further away from the longhouse than in former days."

A fortiori, if the owner of such customary farming rights not only moves out of the longhouse but also leaves the same Penghulu's district and emigrates to another Division in Sarawak with his family, it is the opinion of the court that he shall be deemed to have abandoned his *temuda* land and lost all his customary rights to it. In which event, the abandoned land shall be known as *tanah orang pindah* or as is commonly known as *tanah perintah* in the Second Division.

Applying the law to the facts of the instant case, and in the opinion of the court, the answer to question (a) would be in the affirmative.

The answer to question (b) must be confined to the specific finding of facts by the Resident's Native Court. Theoretically, when a Dayak abandons his *temuda* land by moving to another Division in Sarawak, his customary rights are extinguished and the land reverts back to the State. If another Dayak from the same longhouse or same Penghulu's district makes use of the land with the permission of the *Tuai Rumah* or the Penghulu, who has control over the said land, the user acquires a right to the land. This is expressly provided in the last sentence of clause 4 of paragraph 7 of the Native Customary Laws, Vol. 7 on page 636 which reads: "... In such a case, the original owner has no right to prevent others from making use of the land and the user acquires the right." In the present case, the Resident's Native Court found that Tua Rumah Tuah anak Singalang and Ngindang anak Sengalang had made use of the disputed *temuda* land since the departure of Tamboh from the district apparently without interruption, as there was no evidence adduced to the contrary. There was also the evidence that when the Public Works Department wanted to occupy the disputed *temuda* land about six years ago, permission was given by Tua Rumah Tuah and Ngindang. Furthermore, when fruit trees on it were cut down, compensation was paid to and received by them. On the other hand, no evidence had been produced by Injing anak Kunbang that he had been using the disputed *temuda* land at any time. Under the circumstances, it follows that both Tua Rumah Tuah anak Singalang and Ngindang anak Sengalang have acquired a right and interest in the disputed *temuda* land.

Having regard to the evidence adduced in the lower courts, this court comes to the conclusion that the decision of the Resident's Native Court was correct in law and could be supported by both the Native customary laws and the evidence produced before the courts. The judgment of the Resident's Native Court is hereby affirmed and this appeal is dismissed with costs.

Ali Majang and **Penghulu Pengabang, Assessors,** concurred.

Appeal dismissed.